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No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This case involves a $79.5 million punitive damage award to a single individual in a product liability case recast as a "fraud" claim. Although the products at issue are tobacco products manufactured by petitioner, some variant of the due process questions presented by this case arises in virtually all product liability cases in which punitive damages are sought.

Amicus will address (1) the special dangers in the product liability context of the Oregon Supreme Court's approach allowing the reprehensibility guidepost to "override" the ratio guidepost when applying the due process standards established by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); and (2) the reasons why due process requires that juries be instructed that punitive damages must bear a reasonable relationship to the plaintiff's harm and that they may not be imposed to punish the defendant for alleged harm to individuals other than the plaintiff.

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 133 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached in the Addendum.

The due process questions presented by this case are not unique to Philip Morris or the tobacco industry. Virtually all corporations are vulnerable to arbitrary and excessive punitive damage awards when juries are not given adequate instructions, and reviewing courts decline to enforce the due process guideposts that help ensure reasonableness and proportionality. Because plaintiffs routinely seek punitive damages in product liability cases, and such cases present special

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than PLAC or its counsel made a monetary contribution to the preparation or submission of this brief.

dangers and concerns, the fair administration of punitive civil sanctions is an issue of great importance to product manufacturers, and PLAC has filed *amicus* briefs in this Court's three most recent decisions involving constitutional excessiveness challenges to punitive damage awards: *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

STATEMENT

Respondent Mayola Williams, the widow of a smoker, sued petitioner Philip Morris USA, asserting fraud and negligence claims in connection with the death of her husband from lung cancer. Petitioner's Appendix ("Pet. App.") 1a. An Oregon jury awarded respondent $821,485 in compensatory damages—including $800,000 in non-economic damages—and $79.5 million in punitive damages. *Id.* at 9a.

Although the trial court remitted the punitive damage award as excessive under the federal constitutional guideposts, the Court of Appeals reinstated the award in full, 48 P.3d 824 (Or. Ct. App. 2002), and the Oregon Supreme Court denied review. 61 P.3d 938 (Or. 2002). This Court then granted certiorari, vacated the Court of Appeals' judgment, and remanded for reconsideration in light of *State Farm*. 540 U.S. 801 (2003). On remand, the Court of Appeals again held that the full award must be reinstated, notwithstanding the more rigorous *State Farm* standards. Pet. App. 35a.

The Oregon Supreme Court affirmed. The court emphasized that it was required to construe "all facts" in the light most favorable to plaintiff, and that so construed "there can be no dispute that Philip Morris's conduct was extraordinarily reprehensible." Pet. App. 23a.

The court acknowledged that the 97:1 ratio of punitive to compensatory damages exceeded the constitutional limits set forth in *State Farm*, stating that the ratio "substantially exceed[s] the single-digit ratio (9:1) that the Court has said or-

dinarily will apply in the usual case." Pet. App. 31a. Nonetheless, the court reasoned that Philip Morris's allegedly high level of reprehensibility sufficed to "overrid[e]" the ratio guidepost, explaining:

> Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

Id. at 33a. The court concluded that "the jury's $79.5 million punitive damage award against Philip Morris comported with due process." *Id.* at 2a, 33a. The court also held that Philip Morris was not entitled to a jury instruction providing, in part, that "[t]he size of any punishment should bear a reasonable relationship to the harm caused to [respondent's husband] Jesse Williams by the defendant's punishable misconduct" and that would have barred the jury from "punish[ing] the defendant for the impact of its alleged misconduct on other persons." *Id.* at 17a.

SUMMARY OF ARGUMENT

1. The Oregon Supreme Court's ruling that the reprehensibility factor can "override" the ratio guidepost's proportionality requirement contradicts *State Farm* and *Gore*. This approach would deprive the due process guideposts of any real meaning in many product liability cases, including cases like this one, where the plaintiff has advanced a novel fraud-based cause of action as the basis for punitive damages.

Product liability cases have common features, and pose special dangers, that require especially rigorous application of the ratio guidepost. These cases are a modern development that did not exist when the Fourteenth Amendment was ratified. They often present tragic factual circumstances involving death or serious injury, and the risks that juror passion or prejudice or sympathy will result in an unwarranted

or arbitrary punishment against a manufacturer are particularly high. The compensatory damages are often quite substantial, and include significant non-economic damage components.

Moreover, because the products are mass produced, plaintiffs' attorneys almost always argue, as in this case, that the jury should use its verdict to protect, and vindicate the rights of, other consumers who are not before the court. And jurors are often encouraged to impose punitive damages for the purpose of regulating public safety.

This Court's previous decisions analyzing due process challenges to punitive damages were rendered in the commercial sphere and thus the Court has not delineated in any detail the factors that should be considered in analyzing reprehensibility in the personal injury context. To date, most courts have taken a very superficial approach, based on a highly deferential standard of review and the jury's findings of "malice." They simply note that the company "knew" its product posed unreasonable risks of harm and that physical injury resulted, making the conduct highly reprehensible. But this approach ignores the fact that virtually *all* products pose risks that persons will be injured or killed when using the products and provides no meaningful protection against unconstitutional punishments.

For all of these reasons, the Court should reject the Oregon Supreme Court's holding that the reprehensibility factor can override the ratio guidepost and confirm that where, as here, the compensatory damages are substantial and contain a component for emotional distress, a ratio of 1:1 or lower often will be required.

2. The Oregon Supreme Court further erred in refusing to instruct the jury that it could not punish Philip Morris for harm to nonparties—and that any award of punitive damages must be reasonably related to the compensatory damage award. This Court has long held that proper jury instructions are necessary to ensure that verdicts are consistent with constitutional limits on state authority. In its punitive damages

jurisprudence, the Court has condemned vague instructions and emphasized that jury instructions are a critical bulwark against arbitrary and excessive awards.

The refusal to give a "harm to nonparties" instruction violates *State Farm* and can transform a case into a pseudo-class action, in that it enables a single plaintiff to obtain what amounts to classwide relief—without having to satisfy the procedural requirements of a legitimate class action. Particularly in a products case, where plaintiffs often exhort the jury to vindicate the rights of *all* users of a mass-marketed product, such an instruction helps ensure that the resulting award stays within constitutional limits.

A "reasonable relationship" instruction is warranted as well. The principle of proportionality—that a civil sanction must be reasonable and proportionate to the harm committed by the defendant—has a long pedigree in American constitutional and common law. An instruction that focuses the jury on the need for a reasonable relationship between the punitive damage award and the harm to the plaintiff helps guide the jury in assessing the proper amount of a punitive sanction, and reduces the likelihood of an arbitrary punishment.

ARGUMENT

I. PRODUCT LIABILITY CASES POSE SPECIAL DANGERS OF ARBITRARY PUNITIVE DAMAGE AWARDS THAT REQUIRE RIGOROUS APPLICATION OF THE RATIO GUIDEPOST

This Court has repeatedly recognized that "punitive damages pose an acute danger of arbitrary deprivation of property," and "it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm*, 538 U.S. at 416-17 (quotation marks omitted). *State Farm* and *Gore* held that the due process analysis should be conducted by reference to three guideposts: the reprehensibility of the defendant's conduct; the ratio between punitive and actual or potential damages; and the difference

between the award and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. "The[se] principles . . . must be implemented with care, to ensure both reasonableness and proportionality." *Id.* at 428.

The Oregon Supreme Court's holding that the reprehensibility guidepost can "override" the ratio guidepost is wrong and would drain the due process guideposts of any constraining force in many product liability cases. Indeed, product cases bear special characteristics and pose special dangers that call for rigorous application of the ratio guidepost to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426.

1. Product liability claims were not known at common law and at the time of the ratification of the Fourteenth Amendment. Mass-marketed products are a modern development, and the modern product liability doctrine was not recognized until the second half of the twentieth century. *See Greenman v. Yuba Power Prods.*, 377 P.2d 897 (1963).

In the physical injury context, punitive damages at common law were reserved for cases involving intentional violence. *Cf. Gore*, 517 U.S. at 575 n.24 (quoting *Blanchard v. Morris*, 15 Ill. 35, 36 (1853) ("'We cannot say [the exemplary damages] are excessive under the circumstances; for the proofs show that threats, violence, and imprisonment, were accompanied by mental fear, torture, and agony of mind'")). But the modern law of product liability focuses not on the mental state of the defendant but on a retrospective balancing of societal risks and benefits and the spreading of losses; the infliction of *any* punishment through the tort system was questioned early on by one of the judicial architects of this product liability doctrine. *See Seffert v. L.A. Transit Lines*, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting) ("Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. . . . They become increasingly anomalous as emphasis shifts in a mechanized society from

ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation."). And the novel "fraud" claim advanced by respondent here as the basis for punitive damages—attacking statements of a manufacturer defending its product in litigation and other public fora—is "new," as the trial court itself recognized. 14B Tr. 109 (characterizing the claim as "something new" and noting that "we haven't seen this particular approach to a fraud claim in Oregon law. And it's a tough one.").

In short, this practice—which allows juries to inflict unlimited punishments against product makers for their mass marketing of a lawful product—was unknown at common law and is a departure from the traditional uses of the civil justice system at the time the Fourteenth Amendment was ratified. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61-62 (1991) (O'Connor, J., dissenting) (citing "the advent of product liability" as a reason for the "[r]ecent . . . explosion in the frequency and size of punitive damages awards"). This fact should inform any due process analysis of the punishment in this case and product liability cases more generally. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (noting that the Court has "stated from its first due process cases, [that] traditional practice provides a touchstone for constitutional analysis"); *id.* at 436 (Scalia, J., concurring) (concluding that by eliminating protections "traditionally accorded at common law," Oregon "violate[d] the Due Process Clause").

2. Cases alleging that a defective product injured a consumer pose heightened risks of arbitrary and excessive punitive damage awards, including where, as here, the punitive damage claim is pegged to a new brand of fraud claim. Such cases often involve tragic personal injuries likely to provoke passion, prejudice and sympathy, and jurors are asked to make an evaluation—in hindsight and on the basis of arcane expert testimony and a complex factual record—as to whether a product design posed an "unreasonable" risk.

As Judge Easterbrook explained in a products case involving an alleged design defect in the emergency stop button on an escalator:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.

Carroll v. Otis Elevator Co., 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted). As Justice Breyer has noted, our tort system "leaves the determination of 'too much risk' in the hands of tens of thousands of different juries who are forced to answer the question not in terms of a statistical life, but in reference to a very real victim needing compensation in the courtroom before them," resulting in "a system much criticized for its random, lottery-like results." Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 59 (1992).

Moreover, as exemplified by the novel fraud claim asserted by respondent, theories of liability are constantly evolving. This evolutionary process can result—as it did here—in the imposition of punitive damages based on new causes of action that did not exist at the time of the conduct being punished. *See, e.g.*, *Flax v. DaimlerChrysler Corp.*, No. 02C-1288 (Tenn. Cir. Ct. 2005) (jury awarded punitive damages on the basis of a post-sale failure-to-warn theory never before recognized under Tennessee law). This feature of product liability law not only bears on reprehensibility but also calls into question whether, as a matter of due process, any punitive damages at all can be imposed. *See State Farm*, 538 U.S. at 417 ("'[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment'" (quoting *Gore*, 517 U.S. at 574)); *Landgraf v.*

USI Film Prods., 511 U.S. 244, 281 (1994) ("Retroactive imposition of punitive damages would raise a serious constitutional question."). Notwithstanding these constitutional concerns, courts have permitted juries to impose huge punishments in such cases.

Furthermore, "[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *State Farm*, 538 U.S. at 417 (quoting *Oberg*, 512 U.S. at 432). As a result, juries sometimes impose massive punitive damage verdicts where there is legally insufficient evidence to impose any punitive damages at all. *See, e.g.*, *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439 (4th Cir. 2001) (reversing $250 million punitive damage award in a design defect case based on insufficiency of evidence).

3. Justice Breyer explained in his concurrence in *Gore* that some courts "make 'reprehensibility' a concept without constraining force." 517 U.S. at 590. And "[w]ithout objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 480-81 (1993) (O'Connor, J., dissenting) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)) (quotation marks omitted); *see also Adams v. Murakami*, 813 P.2d 1348, 1352 (Cal. 1991) ("The determination of whether an award is excessive is admittedly more art than science. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences.") (quotation marks omitted). These observations are especially true in product liability cases.

Indeed, many courts in product cases ignore all objective criteria in judging reprehensibility, instead focusing solely on the fact the jury found malice and that serious injury resulted. *See* Pet. App. 23a-24a (emphasizing that "[t]he harm to Wil-

liams was physical" and that this fact helps support "a very significant punitive damage award"); *Buell-Wilson v. Ford Motor Co.*, 2006 WL 2002858, at *30 (Cal. Ct. App. July 19, 2006) (concluding that Ford acted reprehensibly in part because "[t]he evidence . . . supports a finding that Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management," and upholding $55 million in punitive damages—plus an additional $23 million in non-economic damages—based on an alleged design defect in a vehicle, even though the vehicle fully complied with all federal safety standards and even though the verdict had been preceded by 13 consecutive defense verdicts in other cases alleging the same defect).[2]

But this approach ignores that thousands of injuries are caused annually by pillows, books, crayons, nails and electric Christmas decorations, among other common household products. *See* Jane Spencer & Cynthia Crossen, *Why Do Americans Believe Danger Lurks Everywhere? How a Fixation on Risk, Fed by Labs, Law and Media, Haunts World's Safest Nation*, Wall St. J., Apr. 24, 2003, at A1; Breyer, *supra*, at 3 ("We regulate only some, not all, of the risk that fills the world. Any one of us might be harmed by almost anything—a rotten apple, a broken sidewalk, an untied shoelace, a splash of grapefruit juice, a dishonest lawyer."). Even manufacturers of *toothpicks* "know" that people will be fatally injured when using their products. *See Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991) ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*"). Thus, the fact that a product—including a tobacco product—has some harmful effects

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[2] *But see Clark v. Chrysler Corp.*, 436 F.3d 594, 603 (6th Cir. 2006) (reducing $3 million punitive damage award to $470,000 in wrongful death case, and concluding that "because there is a good-faith dispute over whether [the] testing [advocated by plaintiff's expert] is necessary, . . . Chrysler's conduct does not evince a level of indifference to or reckless disregard for the safety of others" sufficient to justify a $3 million verdict).

does not necessarily mean that it is unreasonably dangerous. *See* Restatement (Second) of Torts § 402A cmt. i (1965) ("[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful").

Unlike traditional cases involving punitive damage claims at common law, modern product liability cases do not involve intentional efforts by the defendant to inflict injury on the plaintiff. For example, in a product case, there is often no dispute that the manufacturer knew the facts upon which the plaintiff's experts base their conclusion that the product is defective. The real dispute is one of policy rather than facts, *e.g.*, whether the undisputed facts render the product unreasonably dangerous, whether the tests recommended by the plaintiffs are a proper way to evaluate the risks, or whether the utility of the challenged design outweighs the risk. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 37 (1982) ("The very notion of how much design safety is enough"—and which design strikes the proper balance among competing interests—is often complex and rests upon a "morass of conceptual, political and practical issues on which juries, courts, commentators and legislatures strongly disagree.").

As a result of the very nature of product liability claims, once a jury concludes from the facts that the product was unreasonably dangerous, it is all too easy for a plaintiff to persuade a jury to take the next step and find that the manufacturer—simply by virtue of the fact that it knew that injuries would occur and that the product might have been designed differently to prevent some of those injuries—also "knew" that the product was unreasonably dangerous and thus acted with malice or "fraud" sufficient to support an award of punitive damages. And once such findings are made, courts defer to them and then often automatically deem the conduct "highly reprehensible."

In this regard, the Oregon Supreme Court's decision to "construe all facts in favor of plaintiff, the party in whose

favor the jury ruled" for purposes of reviewing punitive damages, Pet. App. 23a, is particularly troubling but all too familiar. *See* Pet. for Cert. at 22-28. While the Court did not grant review on this question, the extraordinarily deferential standard of review applied below is another reason to reject any approach that authorizes using the reprehensibility analysis to trump the ratio guidepost. This standard of review permits a court, as the Oregon court did here, to defer to the plaintiff's version of events, deem the defendant to have engaged in "highly reprehensible" conduct based on that skewed depiction and phantom findings that the jury never actually made, and then declare the ratio guidepost inapplicable. Other courts use a similar standard of review. *See, e.g.*, *Buell-Wilson*, 2006 WL 2002858, at *4 ("disregarding contrary evidence submitted by" the defendant, even where uncontroverted).

A regulatory agency that set public policy on the basis of such a distorted view of reality would correctly be seen to be acting irresponsibly. But courts like the Oregon Supreme Court assume that it is perfectly acceptable to make public policy based on just such a view of the evidence. If this is nevertheless an appropriate way for an appellate court to view the evidence, the potential for serious error as a result cuts strongly against any due process rule that allows the reprehensibility analysis to override the ratio guidepost.

4. Many products, including tobacco, are subject to intense government regulation and scrutiny. *See Medtronic Inc. v. Lohr*, 518 U.S. 470, 489 n.9 (1996) (noting congressional finding that government-mandated warnings on cigarette packages are "sufficient" to alert the public to the risks of smoking). Yet plaintiffs' lawyers often ask juries to act as a "super-regulator" and to impose huge punishments to cause the company to change its behavior, to protect the rights of consumers not before the court, and to counteract what the plaintiff's lawyer will claim is inadequate government regulation and enforcement. Although this Court condemned this

practice in *State Farm*,[3] it has continued, as the decision below and other recent rulings demonstrate. *See* Pet. App. 17a-21a; *Buell-Wilson*, 2006 WL 2002858, at *24 ("[P]unitive damages are permitted in product liability actions precisely because '[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles.'") (citation omitted). This type of argument necessarily distracts the jury's attention away from the conduct at issue and the actual harm to the plaintiff—key factors identified in *State Farm*—and the practice of permitting such arguments is an additional reason for enforcing, not overriding, the ratio guidepost in product liability cases.

5. Finally, product liability cases often produce very substantial compensatory damage verdicts, including large non-economic damage awards for pain and suffering and emotional distress.[4] *See, e.g., Buell-Wilson*, 2006 WL 2002858, at *24 (affirming $23 million non-economic dam-

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[3] In *State Farm*, the Court condemned the plaintiffs' effort to persuade the jury to act as a national insurance regulator by imposing a large punitive award. Counsel had argued to the jury that "[y]ou're going to hear evidence that even the insurance commission in Utah and around the country are unwilling or inept at protecting people against abuses," and that "you, here, are going to be evaluating and assessing, and hopefully requiring [the defendant] to stand accountable for what it's doing across the country." 538 U.S. at 420 (quotations omitted); *see also* Breyer, *supra*, at 59 ("Whatever its merits and problems, I do not believe the tort system can serve as a substitute for government regulation.").

[4] As Judge Niemeyer has recognized, non-economic damages are now plagued by the same problems as punitive damages, such as inadequate guidance to juries, which leads to radically varying and arbitrary awards. *See* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1417 (2004) ("without rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damage awards before" *State Farm* and *Gore*).

age award (reduced from $118 million verdict), plus $55 million punitive award (reduced from $246 million)); Alex Berenson, *For Merck, Vioxx Paper Trail Won't Go Away*, N.Y. Times, Aug. 21, 2005, at 1 (Texas jury assessed $24 million in compensatory damages and $229 million in punitive damages against Merck based upon a death allegedly caused by the drug Vioxx); *Sandoz Pharms. Corp. v. Gunderson*, 2005 WL 2694816 (Ky. Ct. App. 2005) (Kentucky jury assessed $7.8 million in compensatory damages and $11.25 million in punitive damages against a drug manufacturer); *see also Interstate Southwest Ltd. v. Avco Corp.*, No. 29,385 (Tex. Dist. Ct. 2005), *appeal pending* (trial court approved jury verdict imposing $86.4 million in punitive damages and $1.7 million consisting of alleged increase in insurance premiums in case involving commercial dispute over cause of a defect in crankshafts used in propeller-driven aircraft engines manufactured by the defendant).

This too militates strongly in favor of meticulous application of the ratio guidepost in product cases, even where a court finds high reprehensibility, as such large compensatory awards serve a deterrent and even punitive function and reduce the need for a high ratio. *State Farm*, 538 U.S. at 426 ("The compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the [plaintiffs] suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.").

Indeed, as the Court held in *State Farm*, where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. For all of the reasons discussed above, this observation carries special force in the product liability context, and it cannot be swept aside by a court based on a subjective finding, construing all facts in favor of the plaintiff, that the conduct at issue was highly reprehensible.

II. DUE PROCESS REQUIRES THAT JURORS BE INSTRUCTED THAT PUNITIVE DAMAGES MUST BEAR A REASONABLE RELATIONSHIP TO THE PLAINTIFF'S HARM AND CANNOT BE BASED ON ALLEGED HARM TO THIRD PARTIES

As mentioned above, plaintiffs in product cases often exhort the jury to punish the defendant for harming individuals other than the plaintiff by widely marketing their products to consumers. Sometimes this argument is framed as a demand for "disgorgement," *i.e.*, that the amount of punitive damages should be sufficient to force the defendant to relinquish all the profit it made from the product in question—which, in the case of a mass-marketed product, is usually a substantial amount. And sometimes the argument is presented as it was here, as a demand that the jury punish the defendant for its conduct as to *all* consumers in the State.

The Oregon Supreme Court erred in refusing to instruct the jury that punitive damages must bear a reasonable relationship to the plaintiff's harm and that it could not punish Philip Morris for conduct that harmed persons other than the plaintiff. This Court should hold that this instruction was required as a matter of federal constitutional law, just as it held in *State Farm* that juries must be instructed on the constitutionally-imposed *territorial* limitations on punitive damage awards. *See* 538 U.S. at 422 ("[a] jury *must* be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred") (emphasis added).

1. In both criminal and civil cases, this Court has held repeatedly that proper instructions are crucial procedural protections that ensure that jury verdicts are consistent with constitutional limits on state authority. In *Taylor v. Kentucky*, 436 U.S. 478 (1978), for example, this Court held that a state court had erred in not instructing the jury on the presumption of innocence, a constitutional safeguard required by due process. In rejecting the argument that no instruction was

required because counsel had argued the point, this Court explained that "[i]t was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." *Id.* at 489; *see also Carter v. Kentucky*, 450 U.S. 288, 304 (1981) ("[M]ost certainly, defense counsel's own argument . . . cannot have had the . . . effect that an instruction from the judge would have had.").

Similarly, in *Cabana v. Bullock*, 474 U.S. 376 (1986), this Court held that "a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." *Id.* at 384. Indeed, as demonstrated by a long list of capital punishment cases, this Court has consistently required that jury instructions clearly reflect the limitations that the Constitution places on jury discretion. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994) (plurality op. of Blackmun, J.) (where a State makes "future dangerousness" relevant to capital sentencing, due process requires that the jury be informed that a life sentence would render defendant ineligible for parole).

This Court has followed a similar course in civil cases. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), for example, this Court found fault in a trial court's instruction to the jury on the issue of whether information on a political candidate's criminal past was "relevant" because the flawed jury instruction "left the jury far more leeway to act as censors than is consistent with the protection of the First and Fourteenth Amendments." *Id.* at 275; *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991) ("[T]he term [actual malice] can confuse as well as enlighten. . . . In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.").

The same need to confine jury discretion within appropriate limits requires that juries be instructed on governing constitutional principles in punitive damages cases. "Vague

instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm*, 538 U.S. at 418. As this Court has emphasized, jury instructions are "a well-established and, of course, important check against excessive awards." *Oberg*, 512 U.S. at 433; *see also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in judgment) (noting that a court's failure to give the jury proper standards for imposing punitive damages "appears inconsistent with due process"). Proper jury instructions will also help eliminate the need for appellate courts to review for excessiveness.

2. The Oregon Supreme Court held that the trial court properly denied Philip Morris's request for an instruction that the jury could "not punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims." Pet. App. 17a-18a. The Oregon Supreme Court held that this instruction did not "correctly state federal due process law," asserting that Philip Morris *could* be punished for harm to nonparties so long as "those other persons were Oregonians who were harmed by the same conduct that had harmed Williams." *Id.* at 20a-21a.

This was error. In *State Farm*, this Court squarely rejected the argument that an individual plaintiff may seek to base a punitive damage award on alleged injuries to third parties not before the court: "A defendant should be punished for the conduct that harmed *the plaintiff*, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423 (emphasis added). The Court emphasized that "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct [because] in the usual case nonparties are not bound by the judgment

some other plaintiff obtains." *Id.* (citing *Gore*, 517 U.S. at 593 (Breyer, J., concurring)).

This case vividly illustrates these concerns. At trial, respondent failed to put on any specific evidence to show that any particular person (other than Williams) continued smoking because of the alleged fraud. Yet despite this evidentiary void, respondent's counsel urged the jury to assume that ten out of every hundred smokers in Oregon would get cancer—and that three or four of those ten would be Marlboro smokers—and then exhorted the jury to use its punitive damage award to punish Philip Morris for the harm caused to these thousands (or more) of unidentified Oregon residents over the span of forty years.

Imposing punitive damages on this basis creates a grave risk of excessive, duplicative punishment for the same conduct. Indeed, because this was not a class action, nothing would prevent each of the thousands of unidentified Oregonians whose rights respondent purported to vindicate from filing his or her *own* individual action against Philip Morris and advancing the same (unproven) assertions of widespread harm that were advanced in this case. And nothing would prevent each individual plaintiff from recovering the same $79.5 million award of punitive damages that respondent received here. Due process forbids such an unfair result. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (a property owner "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in . . . another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment"); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873) (noting "the maxim" in civil cases "that no man shall be twice vexed for one and the same cause").

Other courts around the country have condemned this approach. For example, in *Johnson v. Ford Motor Co.*, 113 P.3d 82 (Cal. 2005), the plaintiffs—purchasers of a used car—brought an individual fraud action challenging Ford's corporate resale policy. *Id.* at 85. Although the plaintiffs

suffered less than $18,000 in harm, they persuaded the jury to punish Ford by "disgorging" the $10,000,000 in profits that Ford supposedly earned from "a thousand or more" similar transactions with other California consumers over a two-year period. *Id.* at 95. No individualized proof was presented, however, that any other consumer *actually* suffered harm from Ford's policy. *Id.* at 96.

The California Supreme Court emphatically rejected the notion that a jury may award punitive damages in an individual action to punish the defendant for its conduct toward third parties. It explained that punishing a defendant in this manner would "'create[] the possibility of multiple punitive damages awards for the same conduct,'" and thus "create[] possibilities for unfairness—to the defendant and other possible claimants both—which may be of constitutional dimension." *Id.* at 94 (quoting *State Farm*, 538 U.S. at 423). The court also recognized that assessing punitive damages in this manner would impose on a defendant all of the burdens, but none of the benefits and procedural protections, of a class action. It noted that, in a true class action, "once the issues common to the class have been tried, and assuming some individual issues remain, each plaintiff must still by some means prove up his or her claim, allowing the defendant an opportunity to contest each individual claim on any ground not resolved in the trial of common issues." *Id.* at 95. By contrast, the court explained, the plaintiffs' approach would permit an individual plaintiff to seek "a large punitive damages award on profits earned from transactions with a large class of similar claimants, but . . . without ever proving the specifics of those 'hypothetical claims.'" *Id.* (quoting *State Farm*, 538 U.S. at 423). Such an award would encompass gains "not necessarily related" to the individual plaintiff's harm, and would "therefore [be] likely to be disproportionate to the individual plaintiff's compensatory award." *Id.*

The Eighth Circuit applied the same logic in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004), where it explained that awarding punitive damages to the non-class-action plaintiff for ConAgra's "similar conduct" toward other

employees would unfairly expose ConAgra to the threat of duplicative punishment:

> Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.

Id. at 797. Because the judgment in such a pseudo-class action is not binding on anyone other than the individual plaintiff, it takes only one award of punitive damages to wipe out prior and subsequent victories. The California Supreme Court characterized this as the "problem of 'successive prosecution' in which a defendant that loses a single case would also lose the benefit of all previous victories against the same claim of misconduct." *Johnson*, 113 P.3d at 94-95.

This concern is not merely hypothetical. By purporting to elevate the single jury verdict here as the sole arbiter of the relative merits of Philip Morris's conduct with respect to thousands of third parties, the Oregon Supreme Court's approach would allow this verdict to erase and nullify the many verdicts that have already been returned *in favor* of Philip Morris relating to the same conduct.

The Oregon Supreme Court's approach also places on defendants the unfair burden of defending not only against the underlying cause of action, but also against allegations that thousands of individuals not before the court were subjected to—and harmed by—the same conduct. In practical terms, it is nearly impossible to mount such a defense, as addressing each claim would consume enormous resources and "unacceptably fragment[] the proceeding into an endless series of 'mini-trials,' distracting the jury from the primary focus of the dispute." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for*

Individual, Private Wrongs, 87 Minn. L. Rev. 583, 654 (2003).

Indeed, certification is often denied in *actual* class actions for this very reason. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). It is anomalous, to say the least, that the respondent in this case—by choosing to file an *individual* action in the first instance, and thus avoiding the onerous burdens of class certification and proving individualized harm that arose in *Castano* and other cases—was thereby effectively permitted to seek punitive damages on behalf of a class of thousands.

3. The Oregon Supreme Court compounded its error by holding that the trial court properly denied the other portion of Philip Morris's requested instruction: that "[t]he size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct." Pet. App. 17a.

This was undeniably a correct statement of law. *See State Farm*, 538 U.S. at 426; *Gore*, 517 U.S. at 581. Indeed, the Fourth Circuit has held that this instruction must be given when a jury is considering punitive damages under Virginia or South Carolina law. *See Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415, 1418 (4th Cir. 1992) (en banc) (holding Virginia's punitive damage charge unconstitutional because the jury was not required to be instructed that punitive damages must be proportional to compensatory damages); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991) (jury imposing punitive damages under South Carolina law must be instructed that "any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused").

Such an instruction is an important procedural protection that helps cabin jury discretion and reduces the likelihood of the jury returning an arbitrary and unconstitutional punishment. *See Haslip*, 499 U.S. at 18 (warning that "unlimited jury discretion . . . in the fixing of punitive damages may in-

vite extreme results that jar one's constitutional sensibilities") (citation omitted).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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ADDENDUM

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL

3M
A.O. Smith Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
The Dow Chemical Company
E & J Gallo Winery

E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.
Masco Corporation

Mazda (North America), Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)

Terex Corporation
Textron, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
Tyson Foods, Inc.
Vermeer Manufacturing Company
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.